

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1818

In the Matter of the Complaint of:

COLUMBIA BASIN ELECTRIC
COOPERATIVE, INC.

Complainant,

v.

UMATILLA ELECTRIC
COOPERATIVE

Defendant.

Regarding Willow Creek Dairy.

UMATILLA ELECTRIC
COOPERATIVE'S RESPONSE IN
OPPOSITION TO PETITION FOR
CLARIFICATION AND
RECONSIDERATION

I. INTRODUCTION

Umatilla Electric Cooperative (“UEC”) responds in opposition to Columbia Basin Electric Cooperative’s (“Columbia Basin”) Petition for Clarification and Reconsideration (“Petition”) in the above-captioned matter.

UEC respectfully requests that the Public Utility Commission of Oregon (“Commission”) deny the Petition and affirm Order No. 19-221, dated July 2, 2019 (“Order”) in full. UEC opposes the Petition because Columbia Basin has failed to identify any error of law or fact in the Commission’s determination that: (a) the Commission has jurisdiction to hear disputes involving ORS 758.450, Oregon’s “Territory Allocation Law”, and may interpret that law to achieve the legislature’s intent; (b) the Commission has authority to adopt and apply the “geographic load center test”; (c) the subject farming operation straddling the boundary between UEC and Columbia Basin constitutes a unified load under the geographic load center test; and (d) UEC is

entitled to serve the unified load of the farming operation because the vast majority of that load is in UEC's service territory. Columbia Basin has failed to show sufficient cause to reexamine any of the issues raised in the Petition and addressed in the Order. Rather, Columbia Basin inappropriately uses the Petition to re-argue the points of law and fact it already presented to the Commission. UEC further objects to any revision or clarification of the Order because the Order is clear and unambiguous.

II. STANDARD OF REVIEW

After the Commission has made an order in any proceeding, any party thereto may request rehearing or reconsideration of the order.¹ The Commission may grant the request only if sufficient reason for rehearing or reconsideration is shown.² A party must demonstrate one or more of the following specific grounds as a basis for rehearing or reconsideration: (a) new evidence that is essential to the decision and that was unavailable and not reasonably discoverable before issuance of the order; (b) a change in the law or policy since the date the order was issued relating to an issue essential to the decision; (c) an error of law or fact in the order that is essential to the decision; or (d) good cause for further examination of an issue essential to the decision.³

The Petition fails to specifically state the basis for reconsideration under the rule, but it appears that Columbia Basin is arguing that the Commission made an error of law or fact in the Order. Rather than demonstrate an actual error of law or fact, however, Columbia Basin simply reargues its case and urges the Commission to come to a different conclusion. While Columbia Basin clearly disagrees with the Commission's Order, the Petition establishes no clear error on

¹ ORS 756.561(1).

² *Id.*

³ OAR 860-001-0720(3).

which that outcome was based and, therefore, neither clarification nor reconsideration is warranted.

III. ARGUMENT

A. Reconsideration or Clarification of the Commission’s Order Is Not Warranted

In the Petition, Columbia Basin makes the same arguments it presented to the Commission in its original briefing. A motion for reconsideration is not an appropriate mechanism for a party to re-litigate the same issues and present the same arguments it made to the Commission during the primary phase of the proceeding.

In its Petition, Columbia Basin’s central argument is that the Commission lacks authority to apply the geographic load center test. Columbia Basin presented this argument late in this proceeding, even though the geographic load center test was adopted in a prior proceeding involving Columbia Basin, and Columbia Basin supported the adoption of that test.⁴ This argument, as well as the other arguments Columbia Basin raises in the Petition, have been thoroughly briefed by the parties and are addressed in detail by the Commission in the Order. Other than again asserting that its interpretation of the Territory Allocation Law is the best interpretation, the Petition does not adequately explain why the Commission could not arrive at the conclusion it did. Reconsideration is therefore not warranted.

In challenging the Commission’s authority to apply the geographic load center test, Columbia Basin argues that ORS 758.450(2) is clear and unambiguous and contains a “clear prohibition” that should have resolved the case in Columbia Basin’s favor. ORS 758.450(2) provides: “[e]xcept as provided in subsection (4) of this section, no other person shall offer, construct or extend utility service in or into an allocated territory.”

⁴ Columbia Basin Response to PacifiCorp’s Motion for Clarification, Docket No. UM 1670, at 2.

Columbia Basin argues that there is no ambiguity in the express terms of ORS 758.450(2), and after reviewing that language alone, it "...should have been the end of the Commission's inquiry in this proceeding."⁵ More specifically, Columbia Basin argues that the Commission exceeded its authority by interpreting the undefined term "users" contained in the definition of "Utility Service." Columbia Basin is wrong.

The Commission determined the legislative intent by examining the text and context of the statute, which is the best evidence of the legislature's intent.⁶ In the Order, the Commission explained "...in the absence of explicit statutory direction on the meaning of 'user' when a load straddles two service territories, we carry out the intent of the statute by interpreting 'user' to mean a customer load."⁷

As explained in the Order, "[t]he Territory Allocation Law defines '[u]tility service,' but does not speak to whether a 'user' may be a unified customer load that straddles two or more service territories, nor does it provide any guidance to the Commission as to how such loads should be served."⁸ The starting point for interpreting a statute is the statute's text and context because it is the best evidence of the legislature's intent.⁹ And, it is well settled Oregon case law that "context" for interpreting a statute's text is "the preexisting common law and the statutory framework within which the law was enacted."¹⁰ The Order adhered to the exact process for statutory construction set forth in *PGE v. BOLI* and *State v. Gaines*.¹¹ Based on the text and

⁵ Columbia Basin Petition for Reconsideration p. 6.

⁶ *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.* ("*PGE v. BOLI*"), 317 OR 606 (1993); *State v. Gaines*, 346 Or 160 (2009).

⁷ Order 19-221 p. 8.

⁸ *Id.*

⁹ See *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.* ("*PGE v. BOLI*"), 317 Or 606, 610 (1993)).

¹⁰ *State v. Ofodrinwa*, 353 Or 507, 512 (2013); *Klamath Irrigation Dist. v. United States*, 348 Or 15, 23 (2010). See also *Stevens v. Czerniak*, 336 Or 392, 401 (2004) (explaining that the context for interpreting a statute's text includes "the preexisting common law and the statutory framework within which the law was enacted.").

¹¹ *PGE v. BOLI*, 317 OR 606 (1993); *State v. Gaines*, 346 OR 160 (2009).

context of the statutory scheme, and to carry out the intent of the Territory Allocation Law, the Commission determined that the meaning of “user” when a load straddles two service territories means a customer load.¹² Columbia Basin disagrees with the Commission’s interpretation, but it has not explained why the term “users” is unambiguous in this context or identified an error of law or fact that prevents the Commission from arriving at that conclusion.

Of note, Columbia Basin’s Petition appears to assume that the farming customer in this case has multiple loads that must be served by different utilities. To the contrary, the Commission made findings that the farming customer comprises a unified load straddling two service territories. It is this fact, which the Petition does not challenge, that reveals the ambiguity in the statute and explains the Commission’s conclusion that the statute is ambiguous regarding which utility gets to serve a single, line-straddling load. The Commission should not allow Columbia Basin to alter the facts in an attempt to erase the ambiguity in the statute the Commission identified.

B. The Order is Consistent with the Territory Allocation Law

The Territory Allocation Law sets out a process by which a utility may be allocated a service territory, “thus providing that utility with the exclusive right, and obligation, to serve customers in that territory.”¹³ In general, once territory is allocated to a particular utility, ORS 758.450(2) prohibits other persons from providing “utility service” in that territory. As explained above, because the law is silent regarding service to a single customer load straddling the service territory of two adjacent utilities, the Commission analyzed the text and context of the statute to interpret the term “users” in the rare situation presented in this dispute.

¹² *Id.*

¹³ *Columbia Basin Electric Cooperative, Inc. v. PacifiCorp*, Docket No. UM 1670, Order No. 15-110 at 4.

By interpreting the term “user” or “users” in this fashion, the Commission determined there is no utility service provided in Columbia Basin’s service territory - and no violation of the Territory Allocation law – because the farm load is not actually in Columbia Basin’s territory. In order to prove a violation of ORS 758.450, one of the factors a complainant must show is that the arrangement involves “utility service” as defined in ORS 758.400(3). There is no *utility service*— as that term is used in the statute—being offered in the allocated territory of Columbia Basin because the user of electricity is the same in both service territories.

The determination of whether a *utility service* is being provided “in” an allocated service territory depends on the location of the load requiring the service. Because the express terms of the statute do not provide clarity on how to determine the location of a load, especially when the load is straddling the line between two service territories, the Commission resolved an ambiguity in the statute and adopted the geographic load center test. If the legislature had intended to define the location of a load in the Territory Allocation Law, it could have done so. Because it did not, however, the Commission was well within its authority to make that determination.¹⁴ Indeed, the Commission has broad discretion to make such determinations.

Based on the reasoning in the Order, there is no “utility service” being provided in Columbia Basin’s service territory under the statute. Utility Service is defined in the statute as:

service provided by any equipment, plant or facility for the distribution of electricity to users or the distribution of natural or manufactured gas to consumers through a connected and interrelated distribution system. "Utility service" does not include

¹⁴ See *In the Matters of Nw. Nat. Gas Co., dba NW Natural, Mechanism for Recovery of Env'tl. Remediation Costs (UM 1635) & Request for Determination of the Prudence of Env'tl. Remediation Costs for the Calendar Year 2013 & the First Quarter of 2014 (UM 1706)*, 319 P.U.R.4th 154 at p. 12 (Feb. 20, 2015) (noting that where the legislature has imposed not “particular structure” for implementing a statute, the Commission has broad discretion). See also *Chase Gardens, Inc. v. Oregon Pub. Util. Comm'n*, 131 Or. App. 602, 605, 886 P.2d 1087, 1089–90 (1994) (affirming that the Commission has authority to interpret statute when it has authority delegated to it to enforce the statute).

service provided through or by the use of any equipment, plant or facilities for the production or transmission of electricity or gas which pass through or over but are not used to provide service in or do not terminate in an area allocated to another person providing a similar utility service. ORS 758.400(3).

To find a violation based on the provision of service in another service territory, the Commission must therefore determine that any service provided by a person: (1) is for the “distribution of electricity to users,” and (2) that distribution must occur through a “connected and interrelated distribution system.” Thus, a legal determination must first be made regarding whether the arrangement constitutes “distribution” of electricity to “users.” If the Commission determines that distribution service to “users” is provided, the Commission must then determine if the distribution to users occurs through a “connected and interrelated distribution system.” These determinations cannot be made without first determining the location of the user or users.

This language has already been interpreted by the Oregon Court of Appeals, which determined that it is “the physical act of distribution to more than one user of electricity or more than one consumer of natural gas that constitutes utility service....”¹⁵

Contrary to Columbia Basin’s argument, the Order¹⁶ is consistent with the interpretation of utility service as defined by the court in *Northwest Natural Gas Co. v. Oregon Public Utility Commission*.¹⁷ In that case, the Court of Appeals noted that the intent of the legislature was to focus on the “user” or “consumer” of a service rather than on a “customer.”¹⁸ Here, the Commission’s interpretation further refines how to determine what constitutes a user or

¹⁵ *NW Natural Gas Co. v Oregon Public Utility Commission*, 195 Or. App. 547, 558 (2004).

¹⁶ UEC notes that the fact pattern presented in this proceeding is materially different than the fact pattern presented in *NW Natural Gas Co. v Oregon Public Utility Commission*.

¹⁷ *Id.*

¹⁸ *Id.* (“The focus of the definition in the statute is on the use of facilities to distribute natural gas to those who use it that is, ‘consumers.’”).

consumer – by looking at what load is being served and where that load resides. Where there is only a single load, there is only one user or consumer. And if a single load straddles two territories, the Commission must determine which utility can serve that load since the legislature has not.

Finally, the Commission is not amending the contract between UEC and Columbia Basin or ignoring Order No. 38089 that established the service territories of the two utilities. That contract and order simply determined where the line would be located between two service territories. As the Commission noted, both the contract and the Order are silent on how to deal with single customer loads that straddle both service territories. The Commission has discretion and authority to interpret the Territory Allocation Law and to resolve disputes under its jurisdiction.

C. The Commission Has Authority to Adopt and Apply the Geographic Load Center Test

Columbia Basin argues that the Commission may not use the geographic load center test to determine which utility has the right to serve a customer whose load extends into two or more service territories. Columbia Basin argues that the plain language of ORS 758.450 makes application of the test illegal. But Columbia Basin’s argument is untenable, unsupported by the text and context of the statute, and fails to address the fact that “[l]oads by their very nature do not adhere to territory maps.”¹⁹

The Commission adopted the geographic load center test because “[t]he Territory Allocation Law is unclear as to which utility has the right to serve a customer that straddles adjoining service territories.”²⁰ In resolving another service territory dispute involving Columbia

¹⁹ Order 19-221, p. 9.

²⁰ Docket No. UM 1670, Order 15-110 at 7.

Basin, the Commission noted that ORS 758.410 allows adjoining utilities to enter into a contract to transfer territory, customers, and facilities, but that the “statute is silent, however, as to the legality of service to that customer where the utilities are not able to reach a negotiated resolution.”²¹

After reviewing how different jurisdictions resolved these situations, and analyzing the text and context of the Territory Allocation Law, the Commission determined that it would use the geographic load center test for customers that straddle adjoining service territories because it “best furthers the purpose of the Territory Allocation Law.”²² The geographic load center test is defined as:

[A] theoretical point determined by giving consideration to the location of the permanent electric loads which have been or which will be installed within a reasonable time as part of existing plans. In effect, this test permits the utility which serves a majority of a customer’s load to serve the entire load, regardless of the territorial boundaries of a service area.²³

In adopting that test, the Commission determined that the geographic load center test helps “best ensure the integrity of the allocated territories by focusing on the nature of the service to be provided.”²⁴ Further, and consistent with ORS 758.405, the geographic load center test helps “avoid the duplication of facilities by accepting the reality that a customer’s facilities may cross a service area boundary and allowing the [predominate] utility to serve the customer’s entire load.”²⁵ The geographic load center test applies only to the electrical load of a single integrated customer. To determine whether a single integrated customer exists, the PUC weighs

²¹ *Id.*

²² Order 19-221 p. 8.

²³ *Id.* at 7.

²⁴ *Id.* at 11.

²⁵ *Id.* Quoting Order No. 15-110 at 8.

a variety of factors to determine if an operation is integrated such that there is a “unified load.”²⁶ In its Petition, Columbia Basin challenges the Commission’s authority to adopt and apply the geographic load center test, but fails to challenge the Commission’s determination that the farming operation was a unified load. Notwithstanding, the fact that the farming operation is a unified load is well documented in the record and needs no further discussion or analysis.

As mentioned above, the Commission adopted the geographic load center test in a case that directly involved Columbia Basin. Columbia Basin not only failed to challenge the Commission’s authority as part of that prior decision, it supported the outcome based on that authority.²⁷ As explained more thoroughly in UEC’s Supplemental Brief, by asserting now that the Commission does not have the authority to use the geographic load center test, Columbia Basin is, at best, admitting that it engaged in “invited error” and, at worst, is mounting a collateral attack on the Commission’s earlier decision. Under the invited error doctrine, “a party who was actively instrumental in bringing about an alleged error cannot be heard to complain, and the case ought not to be reversed because of it.”²⁸ To be clear, the portion of the Commission’s decision in UM 1670 that Columbia Basin could serve Shepherd’s Flat South was beneficial to Columbia Basin, which it would not have wanted to appeal, but a portion of the decision was also adverse to Columbia Basin because it confirmed PacifiCorp’s right to serve Shepherd’s Flat Central, which was partially in Columbia Basin’s territory. Based on the

²⁶ Factors the Commission previously considered when determining if an electric load is “unified” included: (1) the commonality of ownership of constituent electrical loads; (2) the commonality of ownership of land where the constituent electrical loads are located; (3) the commonality of ownership of any related electrical facilities such as collector substations or lines; (4) the commonality of ownership of other facilities and maintenance equipment; (5) the extent to which there is a corporate entity that has unified management authority over the electrical load; (6) the extent to which a corporate entity or management authority exercises a contracting authority related to the electrical loads; and (7) the extent to which constituent electrical loads are permitted under the same regulatory permits.

²⁷ Columbia Basin’s Response to PacifiCorp’s Motion for Clarification, Docket No. UM 1670, at 2.

²⁸ *Hatley v. Umatilla County*, 256 Or. App. 91, 112 (2013) (internal citations omitted) (also acknowledging the doctrine of invited error applies in administrative proceedings).

adverse portion of the decision, Columbia Basin had an incentive to appeal the decision to correct the legal error Columbia Basin now claims the Commission made. By instead arguing to the Commission that its decision in UM 1670 was lawful and grounded in the statute, which served to urge the Commission to affirm the portions of its decision that were beneficial to Columbia Basin, Columbia Basin invited the Commission and other parties to rely on that outcome in future cases – including this one. Columbia Basin should not be rewarded for making legal arguments in one docket where doing so results in a benefit to Columbia Basin and then making the opposite legal argument in a different docket to avoid a detriment that is the natural result of its arguments.

D. Consistency of the Geographic Load Center Test with the Territory Allocation Law

Contrary to Columbia Basin’s claims, the Commission’s application of the geographic load center test for customers that straddle two service territories is consistent with the Territory Allocation Law. Not only is this issue discussed in detail in the Order, it was fully briefed by UEC in its response brief, which UEC incorporates here.

E. There is No Duplication of Utility Facilities

Columbia Basin continues to argue that there is duplication of facilities and that its assets will be stranded. As explained by the Commission, the geographic load center test helps “avoid the duplication of facilities by accepting the reality that a customer’s facilities may cross a service area boundary and allowing the predominate utility to service the customer’s entire load.”²⁹ Further, Columbia Basin’s arguments are contrary to the evidence in the record and fully briefed by the parties, which UEC incorporates here.

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²⁹ Order 19-221 p. 11, *quoting* Order No. 15-110 at 8.

F. The Commission Should Reject Columbia Basin’s Request to Clarify

In the event Columbia Basin’s request for reconsideration is denied, the request for clarification should also be denied because the order is clear and unambiguous. Columbia Basin identifies no portion of the Order that, if adhered to, requires clarification.

IV. CONCLUSION

For the foregoing reasons, UEC respectfully requests that the Commission deny the Petition and affirm Order No. 19-221.

Dated this 16th day of September 2019.

Respectfully submitted,

/s/ Chad M. Stokes

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